No. 79-1128

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

THE RIVER OWNERSHIP ISSUE

Respondents' transparent attempt to revise this Court's enunciation of the "equal footing doctrine" as applied to Indian reservations should be summarily rejected. See U.S. Br., pp. 13-16. It is firmly established that the strong constitutional presumption against alienation of the beds of navigable waters prior to statehood (see *United States* v. *Oregon*, 295 U.S. 1, 14 (1935); *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370, 373 (1977)) survives the mere creation of an Indian Reservation. *United States* v. *Holt State Bank*, 270 U.S. 49, 55

(1926). Cf. *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620, 634 (1970); *Donnelly* v. *United States,* 228 U.S. 243, 259-262, 264 (1912). There are only two cases in which this Court has squarely faced the issue of whether in fact the United States had conveyed to an Indian tribe the bed of navigable waters in the face of opposing claims made by or on behalf of a sovereign state: *United States* v. *Holt State Bank, supra;* and *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970).[1] It then becomes necessary to further analyze *Holt* and *Choctaw* to ascertain which is most closely applicable to the facts in this case.

(a) *Holt State Bank:* The United States argues: "The upshot is that, as of 1858, there had been no treaty recognition or confirmation of any Chippewa title later known as the Red Lake Reservation." U.S. Br., p. 22; cf. Tr. Br., pp. 12-13. Although it is true that prior to 1863, the United States had not concluded a specific treaty with the Red Lake Band (Treaty of October 2, 1863, 13 Stat. 667), it is solidly established that the United States recognized that the band owned and occupied the land ceded in that treaty long before 1863.

Congressional recognition of Red Laker title was implicit in the Acts of June 19, 1860, 12 Stat. 44, 59, and July 5, 1862, 12 Stat. 512, 528, authorizing negotiations to extinguish "their title" to lands in the State of Minnesota. See also *The Congressional Globe,* Vol. 32, 2091 (37th Cong., 2nd Sess.).

In the negotiations which led up to the Treaty of 1863, there were repeated requests by Alex Ramsey, the United States' negotiator, for the Red Lake Band to "sell" their lands. *Journal of Proceedings Connected With The Negotiation Of A Treaty With The Red Lake and Pembina Bands of Indians*

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[1] Other cases relied upon by Respondents did not squarely face this issue. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918), was decided in Alaskan territorial days. "The reservation was not in the nature of a private grant, but simply a setting apart, until otherwise provided by law" of public property for Indian use. 248 U.S. at 88. The "equal footing doctrine" was not discussed. *Donnelly* v. *United States,* 228 U.S. 243 (1913), just as *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77 (1922), did not involve navigable streams. In *Brewer-Elliott Oil & Gas Co.,* the question raised here was specifically preserved. 260 U.S. at 86. In *Donnelly,* United States trust title was actually confirmed by application of the "equal footing doctrine," and this Court recognized California's right to alienate title to the beds of navigable or non-navigable streams. 228 U.S. at 262-264.

(hereafter "Journal"), National Archives List No. 6, Treaty No. 327, Item 16, pp. 15, 27, 38. The Red Lake chiefs at first obstinately refused to discuss price, regaling Ramsey with the story of how they had wrested control of the territory from other tribes, such as the Sioux. Chief Little Rock asserted that the whole area, rivers, forests, fish, and animals "belongs to us." (*Id.*, at 11-12; see also pp. 13, 39 and Little Rock's speech at 43.)[2] Prior to these negotiations, the Red Lake Band had been stopping boats traveling up the Red River and extorting tolls from them. The treaty was intended to secure safe and uninterrupted passage and commerce on the water system through the cession. See, e.g., *The Congressional Globe, supra; Journal, supra,* at 27, 44.

These negotiations resulted in the Red Lake and Pembina Bands selling the United States a vast area of land in 1863. 13 Stat. 671. The lands not ceded continued to be known as the Red Lake Reservation until 1889, when a large portion, including Mud Lake, was ceded to the United States. 25 Stat. 642. Prior to 1889, Indian title had never been extinguished, and the fee was held in trust for the Red Lakers. Implicit in these congressional acts is that prior to 1863, the Band was the exclusive owner and occupant of a vast area of land which encompassed hundreds of square miles of navigable waters. It was this prestatehood ownership status which this Court recognized in *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389 (1902) (compensable "sacred" title), and *United States* v. *Holt State Bank, supra,* 270 U.S. at 58.[3]

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[2] Compare with the similar claims made by the Crow both in 1867 and 1873. (Crow Brief, pp. 19-24) Despite these claims of ownership, this Court, in *Holt*, was not persuaded to depart from the "equal footing doctrine."

[3] The courts have consistently acknowledged that the Red Lake Band owned and was entitled to the exclusive possession of their lands prior to Minnesota statehood. See *Chippewa Indians* v. *United States*, 301 U.S. 358, 360-362 (1936); *Chippewa Indians* v. *United States*, 80 Ct.Cls. 410, 424-425, 437, 442, 464, 466, 467 (1935); *United States* v. *Minnesota*, 466 F.Supp. 1382, 1383 (D.Minn., 1979), aff'd sub. nom. *Red Lake Band of Chippewa Indians* v. *Minnesota*, 614 F.2d 1151 (8th Cir.), cert. den. 49 U.S.L.W. 3270 (1980). The executive branch has also recognized Chippewa title to northern Minnesota long before statehood. See e.g., Annual Report of the Commissioner of Indian Affairs, 1849-1850, pp. 9-11, 94; Annual Report of the Commissioner of Indian Affairs, 1863, pp. 429, 430. See also documents cited in *Chippewa Indians* v. *United States*, *supra*, 80 Ct. Cl. at 424-425, 464.

Despite the Red Lakers' right to exclusive ownership of their lands, there was no evidence that the United States was departing from its established rule that title to beds of navigable waters would be conveyed to the state upon admission. *Holt*, at 58-59. It was clear that because the fee to the navigable water had never been conveyed prior to statehood, it passed to Minnesota in 1858—a factual situation directly apposite to this case.

(b) *Choctaw:* In *Choctaw*, this Court was confronted with a unique fact situation totally different from this case. In 1830 and 1835, when the treaties with the Choctaw were negotiated, the "equal footing doctrine" had not yet been enunciated by this Court. By 1868, that doctrine was fully entrenched. *Martin* v. *Waddell*, 41 U.S. 366 (1842); *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). It is presumed Congress was cognizant of the doctrine and was acting to implement it when it approved the 1868 treaty. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587, 593, n. 13 (1977), ("surrounding circumstances" to be considered in ascertaining intent).[4]

Additionally, the Choctaw and Cherokee were moved to a remote area in which no territories had been established and in which no states were then contemplated. In 1868, the Territory of Montana had been established with a territorial capital and defined country boundaries, some of which included the to-be-created Crow Reservation.[5]

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[4] Cf. *Confederated Salish & Kootenai Tribes* v. *Namen*, 380 F.Supp. 452, 461-466 (D.Mont., 1974), aff'd 534 F.2d 1376 (9th Cir.), cert. den. 429 U.S. 929 (1976) ("*Namen I*"); *Confederated Salish & Kootenai Tribes* v. *Namen*, 6 *Indian Law Reporter*, F-161 (D.Mont., September 19, 1979) ("*Namen II*"). The position taken by the United States is incongruent with their position in *Choctaw*, *supra* (United States' amicus brief, p. 12): "The 'equal footing doctrine' is generally traced to the decision in *Pollard* v. *Hagan*, 3 How. 212, a decision rendered in 1845—ten years after the treaty with the Cherokees was concluded and fifteen years after the treaty with the Choctaw. Thus, it is immediately doubtful that the silence of the treaty-makers on the precise question of ownership of the riverbed can fairly be interpreted as a conscious decision to reserve these lands to assure the 'equal footing' of a future State."

[5] The United States brief in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, stressed the fact that there was no "demonstrable expectation that the lands involved will ultimately form part of a state" as a distinguishing feature from *United States* v. *Holt State Bank*, *supra*. United States amicus brief, p. 16.

The treaties involved, of course, were significantly different, for in the treaties of 1830 and 1835,[6] the United States conveyed the lands to the tribes in fee simple; whereas, in the 1868 treaty, the fee, as in *Holt*, had been withheld.[7] This Court recognized in *Choctaw:*

> "that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood. The sole question is whether the treaty *grants* from the United States *conveyed* title." (397 U.S. at 628 (emphasis supplied)).

The Choctaw and Cherokee treaties established those tribes as full sovereigns of their territories and guaranteed them that they would never become a part of any state or territory. It was this guarantee which led the United States to argue in *Choctaw* that:

> "these tracts assured the Indians a sovereign autonomy that, by necessary parity of reasoning, must be taken as passing title to the riverbed to them as the authority that was constituted in lieu of a prospective state." (United States' amicus brief, p. 17; see also pp. 7, 9, 18, 21, and 25.)

Petitioners (Br., pp. 20-23) and the Chickasaw Tribe (Br., pp. 24-32) made similar arguments. No such promises were made to the Crow.[8] The Crow treaty provisions recognized exclusive federal authority to arbitrate disputes, sanction non-members, pass laws governing tribal lands, and the Indians agreed to submit themselves to schooling and "civilization." Arts. 1, 5, 6, 7; App. to Pet., pp. 88, 90-92. The United States, in *Choctaw*,

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[6] Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333; Treaty of New Echota, December 29, 1835, 7 Stat. 478; F&G Exhibits 67 and 68.

[7] This cardinal distinction between *Holt* and *Choctaw* was repeatedly emphasized throughout petitioners' and amicus briefs in *Choctaw*. United States' amicus brief, pp. 6, 8, 16, and 21; petitioner's brief, pp. 27-32.

[8] Although the argument is advanced that the disclaimer clause in Montana's Enabling Act was tantamount to the guarantee to the Choctaw, this Court has held to the contrary. *Draper* v. *United States*, 164 U.S. 241, 243 (1896). Cf. *Organized Village of Kake* v. *Egan* 369 U.S. 60, 67 (1962); *United States* v. *McBratney*, 104 U.S. 621 (1881).

recognized that the *Holt* rule applied to Indian reservations and would apply to *Choctaw* but for the marked distinguishing factors listed above. It is the very absence of those distinguishing factors which renders *Choctaw's* conclusions inappropriate here.

(c) *Exclusivity:* The Repondents argue that ownership of the Big Horn River in the State would violate tribal guarantees of exclusivity. If this is true, then the river cannot be subject to a navigational servitude, because one cannot have exclusivity when surcharged with a servitude which, by definition, includes (1) free navigation and commerce, and (2) the right to enjoy the public fishery. *Shively* v. *Bowlby,* 152 U.S. 1, 17 (1894); *Martin* v. *Waddell, supra,* 41 U.S. at 409, 414.[9] The United States has acknowledged the burden of this navigational servitude on the Big Horn River. United States' Answers to Interrogatories no. 37, 40-42; 1 J.App., pp. 3-4. Of course, with the navigational servitude, there is the dilution of exclusivity which renders any argument predicated upon exclusivity facially unsupportable.

(d) *Description:* The fact that treaty and legislative descriptions included the "mid-channel" of rivers does not evidence an intent to depart from the "equal footing doctrine." In *Holt,* hundreds of square miles of navigable waters were wholly within the Red Lake Reservation. 270 U.S. at 58. Cf. *Martin* v. *Waddell, supra,* 41 U.S. at 414; *Puyallup Tribe, Inc.* v. *Washington State Game Dept.,* 433 U.S. 165 (1977). Political control over members and assurances that tribal water and fishing rights attach to the rivers fully explain the descriptions but do not go so far as to evidence an intent to divest Montana of the equality with which the thirteen original colonies were clothed. If, indeed, descriptions control intent, then Montana, and its amici states,[10] would be divested of hundreds of miles of navigable waters. See, e.g., Royce, *Indian Land Cessions in the United States,* 18th Annual Report of the Bureau of American

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[9] This public right of fishery has been withheld while an area reserved for Indian use was still in a territorial condition under federal regulations to secure to the Indians their traditional food and economic interest in the fish resource (*Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918))—a fact situation not present here.

[10] See amici briefs for State of Idaho, et al., and State of Washington.

Ethnology, Pl. CXLVI, No. 374, Pl. CXLVII, No. 623; No. 604, No. 695. As developed below, such a result would be anathema to well-entrenched congressional policies.[11]

(e) *The Importance of the Ownership Issue:* Although it is true a dispute over fishing and hunting regulation was the catalyst for this litigation, the issue here is not so modest. The nature of a state's interest in navigable waters "lie in the protection of navigation, fisheries and similar purposes." *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977).[12]

By enacting the McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666, Congress waived both federal and tribal sovereign immunity so that water rights could

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[11] Lower court decisions which have held reservation descriptions included beds of navigable waters are either distinguishable or entirely fail to apply the principles of the "equal footing doctrine." In *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir., 1942), the *Holt* decision and the "equal footing doctrine" were neither cited nor discussed in the opinion or in any of the appellate briefs. Since *Rochester*, the federal courts have felt bound by that decision, but the issue of lake ownership has been challenged and remains alive. *Confederated Salish & Kootenai Tribes* v. *Namen*, CV-2343 6 *Indian Law Rptr.* F-161 (D.Mont., September 19, 1979), on appeal to the Ninth Circuit. *Moore* v. *United States*, 157 F.2d 760 (9th Cir., 1946), relied heavily upon the dependence of the Indians upon the tribal fishing and hunting enterprises to support its conclusion that the waters were within the reservation, distinguishing *Holt* on that ground (157 F.2d at 765). In the absence of such a showing, the same court has withheld from an Indian tribe title to navigable waters. *Skokomish Indian Tribe* v. *France*, 320 F.2d 205 (9th Cir., 1963). If the rationale of *Moore*, *Alaska Pacific Fisheries* v. *United States*, *supra*, and *Skokomish* were applied to the facts in this case, the fact that the Crow have evidenced little interest in the fishery would dictate that the ownership issue be decided in favor of the State. See also *United States* v. *Stotts*, 49 F.2d 619, 620-621 (9th Cir., 1930). It is also evident in reading these decisions that in almost each instance, the court was not required to address the ownership issues. The rights of the Indians, whether in the fishery or the water, could have been adequately protected without departing from the "equal footing doctrine." (See, e.g., Petitioners' brief, pp. 19-20.) The "upshot" is that closely scrutinized, the lower court decisions give little assistance in resolving the ownership issue in this case.

[12] Montana's interests on the Big Horn not only involve a property interest (70-1-202, M.C.A., Pet. brief, p. xiii) but also include water quality (75-5-101, et seq., M.C.A.); appropriation and use of water (85-2-301, et seq.

(footnote continues)

be adjudicated under state water laws. *Colorado River Conservation District* v. *United States, ("Akin")* 424 U.S. 800, 811-812, 819 (1976). In light of Congress' deference to state adjudicatory policies, it would appear inconsistent to then piecemeal out the ownership of some of our major streams to incomplete sovereigns apparently intent upon disrupting unified state schemes (*Akin, supra,* 424 U.S. at 819) and implementing their own (*Colville Confederated Tribes* v. *Walton,* (9th Cir., 1980) ___F.2d ___, Slip Op. 15).[13]

The Big Horn River is a tributary to the Yellowstone River, the last major "free flowing" stream in the United States.[14] The State has just completed a protracted administrative hearing under its Water Reservation Act (85-2-601, et

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(footnote continued)

and 401, et seq., M.C.A.); stream protection (87-5-501, et seq., M.C.A., 75-7-101, et seq., M.C.A.); flood plain and flooding management (76-5-101, et seq., M.C.A.); public water supplies (76-5-101, et seq., M.C.A.) (Articles II and V.), and honoring its commitments under the Yellowstone River Compact (85-20-101, et seq., M.C.A.). This compact specifically delimits each member state's interest in the Big Horn River. Congressional approval of the compact was given October 20, 1951, 63 Stat. 152. See Articles II and V. It then became a federal law. *Petty* v. *Tennessee-Missouri Bridge Com.*, 359 U.S. 275, 278-279 (1959); *League to Save Lake Tahoe* v. *Tahoe Reg. Plan. Agcy.*, 507 F.2d 517, 523 (9th Cir., 1974).

[13] Congress has consistently exhibited an intent to leave water appropriation and regulation in state hands. (Act of March 3, 1891, 26 Stat. 1095, 1097, as amended 43 U.S.C. §946; Federal Reclamation Act of 1902, 32 Stat. 388; see 43 U.S.C. § 383; Federal Power Act of 1920, 41 Stat. 1068, 16 U.S.C. §802, et seq.; Flood Control Act of 1944, 58 Stat. 887, 33 U.S.C. §701-1; see also *State of California* v. *United States,* 438 U.S. 645, 664-672, 678 (1978); *United States* v. *New Mexico,* 438 U.S. 696, 702 (1978), n. 5: "See Hearings on §1275 before the subcommittee on Irrigation and Reclamation of the Senate Committee on Interior & Insular Affairs, 88th Cong. 2nd Sess., 302-310 (1964) (App. B, supplementary material submitted by Sen. Kuchel), listing 37 statutes in which Congress has expressly recognized the importance of deferring to state water laws * * *.")

[14] Posewitz, *No Longer Just a Dream,* Montana Outdoors, March/April, 1979, pp. 35, et seq. The Big Horn River contributes, on an average annual basis, 2,873,000 acre feet a year (afy) to the Yellowstone. U.S. Geological Survey Water Supply Paper—Water Resources Data— Montana—Water Year 1978, p. 396. The confluence of the Big Horn and Yellowstone Rivers is downstream from Billings, Montana, and measurements of the Yellowstone River reflect a net increase between Billings and Miles City, after deducting other major tributaries, of 2,971,400 afy. *Id.*, at 352, 499, 512.

seq., M.C.A.), which, *inter alia,* reserved large amounts of water from the Big Horn for water quality, municipal, agricultural, and fish and game purposes. Clark, *The Reservation Challenge,* Montana Outdoors, March/April, 1979, p. 29 et seq.; Order of Board of Natural Resources of Yellowstone River Basin Reservation, Before the Board of Natural Resources and Conservation of the State of Montana, January 29, 1979. If the title to the Big Horn is indeed vested in the Tribe, then will they argue they can supplant the State's role for overall planning as to that stretch of the Big Horn within the reservation as another tribe has done? *Colville Confederated Tribes* v. *Walton, supra,* Slip Op. at 15. Obviously, vesting Indian tribes with title to the vast stretches of navigable waters within or bordering existing reservations will spawn a plethora of jurisdictional contests. This Court has indicated that Indians should not exercise such draconian jurisdiction over non-Indians. *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). It is for that reason also and to avoid the checkerboard jurisdiction over many of our navigable waters that title to the Big Horn was vested in the State.

THE HUNTING AND FISHING ISSUE

As in recent cases before this Court, this case involves conflicting claims between Indians and non-Indians to a wildlife resource. See *Washington* v. *Fishing Vessel Association,* 443 U.S. 658 (1979); and *Puyallup Tribe* v. *Washington Game Department,* 433 U.S. 165 (1977) *("Puyallup III").* In these latter two cases, however, and in all of the prior Indian hunting and fishing cases to reach this Court, the challenge was to a state regulatory system.[15] That system, it was claimed, allowed the Indians too little and the non-Indians too much, thereby violating the Indian treaty rights to that resource.

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[15] *Ward* v. *Race Horse,* 163 U.S. 504 (1896); *United States* v. *Winans,* 198 U.S. 317 (1905); *New York ex rel. Kennedy* v. *Becker,* 241 U.S. 556 (1916); *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919); *Tulee* v. *Washington,* 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game ("Puyallup I"),* 391 U.S. 392 (1968); *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968); *Department of Game* v. *Puyallup Tribe ("Puyallup II"),* 414 U.S. 44 (1973); *Antoine* v. *Washington,* 420 U.S. 194 (1975).

This case is sharply different. We are here concerned with a claim of power by a *tribal government*—not a state—to regulate and allocate the resource. The tribal government claims that power over non-Indians and Indians alike. The claim is that the tribal government itself has the power to decide who shall get what, and how much, and not that the state has allowed the Indians too little.

Glaringly absent from the record in this case is any evidence that the restrictions which the Tribe wishes to place upon non-Indian hunting and fishing on non-Indian lands are in any way necessary to conserve the resource for tribal needs.[16] Further, there is no evidence as to what those tribal needs might be. Rather, the claim is simply that the Tribe has the power to decide unilaterally that, with one limited exception, it can keep the resource entirely to itself, even when that resource is found on non-Indian lands.[17]

What is the source of the Tribe's power to make that decision? The Solicitor General and the Tribe both offer two sources, the first being proprietary in nature, and the second governmental. The Solicitor General, however, emphasizes the first and the Tribe emphasizes the second—undoubtedly with an eye on future assertions of tribal power over non-Indians on

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[16] The record contains *claims* that these restrictions are necessary for conservation. See, *e.g.*, U.S. Br., pp. 4-6. But there is no evidence or findings of fact by the district court to support these claims. The Tribe's professed concern about conservation is belied by the fact that *to this day it has not enacted any fish and game code delimiting seasons, bag limits, or sex*. See, *e.g.*, Tr. 255, 324-326. Moreover, the pressures placed upon the fish and game resources by the non-member do not threaten that resource as claimed by the United States (U.S. Br., p. 41). See, *e.g.*, Tr. 263, 269.

[17] That exception, of course, involves the non-Indian *resident* landowner. Though the Tribe, under the decision of the court below, does not have the power to completely prohibit that owner from hunting and fishing on his own lands, it can still regulate that hunting and fishing, and it can completely prohibit him from accepting his non-Indian neighbor's invitation to hunt or fish on that neighbor's land. Also, it can completely prohibit the landowner from hunting and fishing even on his own land unless he actually resides there.

Though both the Tribe and the United States here fail to contest the validity of the resident landowner exception, they make it clear they do so grudgingly and profess to reserve the right to contest that exception in subsequent actions. Tr. Br., pp. 32, 38; U.S. Br., p. 37.

non-Indian lands in additional areas such as land use or taxation. Tr. Br., pp. 35-43. We take up each of the two proffered sources in turn.[18]

(a) *The Proprietary Source:* The starting point of the argument is most succinctly stated by the Tribe:

> "[T]he Tribe has an exclusive right, in the nature of a profit a prendre, to hunt (and fish) throughout the reservation, regardless of whether the locus is on trust or fee [non-Indian] land." (Tr. Br., p. 31)

Two questions here arise. First, does that exclusive right extend to non-Indian lands, as the Tribe here asserts? And secondly, if so, may the Tribe enforce that right directly against the non-Indians hunting or fishing on non-Indian lands? Or, alternatively, may it only enforce that right by the same way that the Indian tribes and the United States enforced Indian treaty rights against the Washington State regulatory agencies in *Washington* v. *Fishing Vessel Association, supra, i.e.,* by requiring those agencies to adjust their regulatory systems to fully accommodate those rights?

We first take up the claim of an exclusive right to hunt and fish even on non-Indian lands. Unquestionably, with one exception,[19] the Crow once had an exclusive hunting and

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[18] The power here claimed by the Tribe over non-Indians is a newly discovered power, even for the Crow Tribe itself. Until it adopted Resolution No. 74-05 in 1973, it never attempted to exercise any power over hunting and fishing by non-Indians on non-Indian land. And the district court so found as a fact, despite assertions by the United States and the Tribe to the contrary at trial. (Pet. App., pp. 52, 53) Thus, there existed no "tradition of sovereignty" over hunting and fishing. Cf. *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* U.S. , 65 L.Ed.2d 10 at 46 (1980) (Rehnquist, J., concurring and dissenting.) Further, as the district court also found, the stocks of fish and upland game birds which have been introduced into the reservation have been supplied by either the State or non-Indian organizations, not by the Tribe or the federal government. Pet. App., pp. 38, 39. The policy adopted by the Tribe in Resolution No. 74-05 has, of course, brought these stocking programs to a standstill.

[19] The one exception being the public right of fishery created by the navigational servitude. See p. 6, *supra.*

fishing right, reservation-wide. But it existed not by reason of any specific treaty language relating to hunting or fishing—no such language exists—but rather, by reason of language in Article II of the Second Treaty of Fort Laramie (Pet.App., pp. 88-96, 15 Stat. 649). That language "set apart for the undisturbed use and occupation of the Indians" the land described therein.[20]

But as this Court made clear in *Puyallup III, supra,* 443 U.S. at 177, that language no longer applies to land which has been alienated to non-Indians. This is the critical point that the Solicitor General and the Tribe carefully ignore.[21]

True, Indian fishing and hunting rights may sometimes survive alienation of the land to non-Indians. Indeed, this was precisely the situation in *Puyallup III, supra.* But those rights survive only because there was language in the treaty which

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[20] The Solicitor General states: "The fundamental flaw in petitioners' argument is their insistence that the tribal right to hunt and fish is necessarily dependent on land ownership." (U.S. Br., p. 34). This misconceives our argument. Our argument is that a treaty right to hunt and fish must be traceable to some treaty provision such as Article II, quoted above. But if Article II no longer applies to a specific piece of land, by reason of its alienation to a non-Indian, the hunting and fishing rights formerly existing with respect to that land no longer apply as well.

We should also note that Article IV of the Treaty does expressly address hunting rights. But those rights extend only to "unoccupied lands of the United States," outside the reservation boundaries (Pet. App., 90). Thus, if the treaty right asserted here exists, it must be by reason of the continued vitality of Article II, not Article IV.

There is here no dispute that the alienation of reservation lands to non-Indians has diluted the exclusive hunting and fishing rights which the Crow once held reservation-wide under Article II. For the "resident landowner" exception to the validity of Resolution No. 74-05, as established by the court below, is not here contested. See n. 17, *supra.* The controversy is over the extent of that dilution and the legal principles pursuant to which that dilution has occurred.

[21] In relying upon *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968), they ignore another critical point (U.S. Br., p. 34; Tr. Br., p. 34). Though tribal hunting and fishing rights there survived termination of the reservation, as intended by Congress, those rights applied only to land which was still in tribal ownership. There was no assertion that they applied to any non-Indian lands, and the question of non-Indian rights was specifically reserved. *Id.,* at 409, n.10.

said they survive. And that language, now familiar to this Court from a host of cases,[22] guarantees the Indians fishing rights in their usual and accustomed grounds and stations, in common with the non-Indian. That language, we must stress, is not found in any treaties with the Crow.[23] Thus, the language of the Second Treaty of Fort Laramie provides no basis for Indian hunting and fishing rights on non-Indian land at all, either exclusive or in common.

At this point, we must make an important distinction. Our submission does not mean that the Crow's treaty rights may have no impact whatsoever on non-Indian hunting and fishing on non-Indian lands. Wildlife, like rivers and streams, have little respect for property lines and reservation boundaries. Thus, for example, an upstream off-reservation landowner cannot withdraw from a stream all the water he wants and thereby deprive a downstream reservation Indian of the water he needs for cultivating his land. Under *Winters* v. *United States,* 207 U.S. 564 (1907), there is an implied treaty right to the amount of water necessary to fulfill the purpose of the reservation—*e.g.*, providing an agricultural base for the Indian landowner.

Similarly, one of the purposes of establishing the Crow reservation was, unquestionably, to provide the Crows a place on which to continue their historical pursuit of hunting. And if the State of Montana allowed non-Indian hunters on non-Indian land within the reservation to hunt without limit and

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[22] Those cases include, in addition to the *Puyallup* series, *United States* v. *Winans,* 198 U.S. 371 (1905); *Tulee* v. *Washington,* 315 U.S. 681 (1942); and *Washington* v. *Fishing Vessel Association,* 443 U.S. 658 (1979). Cf. *Antoine* v. *Washington,* 420 U.S. 194 (1975).

[23] In contrast, the Treaty of Hellgate, 12 Stat. 975 (1855), involved in *State* v. *McClure,* 127 Mont. 534, 268 P.2d 629 (1954), did contain this language. After finishing in Washington Territory, Governor Stevens negotiated in western Montana as well. We should also note that the broad language quoted by both the Solicitor General and the Tribe from that case (U.S. Br., p. 35; Tr. Br., p. 33) was concurred in by only two members of the five-member Montana Supreme Court. See 268 P.2d at 636. The majority of the court realized that the writer was going too far—as indeed he was.

thereby reduce the game available levels, this may result in a violation by the state of the Crows' implied treaty rights.[24]

But that is not the claim now presented to this Court by the Tribe. The claim here is that when that resource is found within the reservation boundaries, however large or small it may be, it belongs entirely to the Tribe, even though it may be found on non-Indian lands. Neither the language of the treaty nor the decisions of this Court support any such claim.

Two final considerations: No claim is made by the Tribe or the United States that a tribal member could ignore fencing or posting by the non-Indian landowners within the reservation. U.S. Br., p. 31. And for good reason; see *Antoine* v. *Washington,* 420 U.S. 194, 207, n. 11 (1975); and I, J.App., pp. 71-72. It would be a strange result indeed if the non-resident owner could prevent the Indians from hunting on the non-Indian land, while that owner could not himself hunt or fish on that same land or allow his friends and neighbors to do so. If the Tribe really has the exclusive rights it here claims, under any sort of logic, posting and fencing should not be able to defeat them. Lastly, the exclusive rights here claimed by the Tribe are not rights which Congress has recognized or to which it has attached any importance. This is shown by the legislative history of 18 U.S.C. § 1165 outlined in our opening brief, which illustrates that Congress eschewed the opportunity to expand § 1165 to include "Indian country." See also Idaho's Amici Br., pp. 18-21.

Thus, Congress deliberately gave no protection whatsoever to the supposed right being asserted here. This Court should do the same.

(b) *The Governmental Source:* Even if, contrary to our submission, the Tribe has exclusive hunting and fishing rights, reservation-wide, it would require some governmental body to

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[24] What the standards for quantifying these acceptable levels might be, of course, is as yet unclear. They might be merely subsistence standards, or they might be a certain percentage of the resource. Cf. *Washington* v. *Fishing Vessel Association, supra.* That issue is not before the Court, and, we trust, never will be. The reason being, of course, the fact that both Montana and Wyoming have strict conservation codes in contrast to the Tribe, which has none.

enforce those rights against non-Indians. In prior hunting and fishing cases, of course, that body has been a state agency, albeit sometimes acting under order of a federal court. Cf., *Washington* v. *Fishing Vessels Association, supra.*

Here, it is asserted, the proper governmental body to enforce those rights is the Tribe itself. Indeed, the argument is that even if the Tribe does not have the proprietary rights that it here claims; nevertheless, as a *sovereign governmental entity,* it can reserve all the wildlife found within its reservation for its own members, with, of course, the exception of the resident landowner.

The tribal governmental power here claimed over non-Indians, of course, extends well beyond the regulation of hunting and fishing. It would extend, as the Tribe itself acknowledges, to zoning of non-Indian lands (Tr. Br., pp. 37, 40, n.32) and to taxation of non-Indians when on those lands (Tr. Br., pp. 40-42). For the Tribe, the non-Indian who moves onto his own land within an Indian reservation is little different from the person who moves to a foreign country; he is subject to a new sovereign and to a whole new set of laws. Moreover, he cannot participate, through the ballot box, in that new sovereign's governmental processes.

This raises, of course, a very troublesome constitutional problem. That problem is best put into focus by the decision in *Holt Civic Club* v. *Tuscaloosa,* 439 U.S. 60 (1978). Under challenge in *Holt* were the "police jurisdiction" statutes of Alabama. These provide generally that persons residing within a certain distance outside a city's boundaries are subject to the city's police, sanitary, and business-licensing powers and to the jurisdiction of the city's criminal courts. Persons within that zone, however, cannot vote in city elections.

For the majority, two factors, in combination, were decisive in saving the statutes. First, the persons attacking the statutes did not reside within the city boundaries. Hence, recent voting rights cases, which had invalidated statutes disenfranchising otherwise qualified residents within the governmental body, were inapplicable. Secondly, the city's jurisdiction within the zone was, in the view of the majority, quite

limited. As pointed out in Mr. Justice Rehnquist's opinion for the court, the situation was not one in which * * * a city has annexed outlying territory in all but name * * * ." 439 U.S. at 72, n. 8. The city, for example, was not empowered to exercise:

> "* * * the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." *Id.*

For the three dissenting justices, neither of these two factors would have saved the statutes. 439 U.S. at 79-88.

Under the constitutional tests applied by the majority, and *a fortiori* under more stringent tests of the dissent, the governmental powers which the Tribe here asserts over non-Indians cannot be upheld. A comparison of the situation of the plaintiffs in *Holt* with that of the non-Indian resident on the Crow reservation shows why.

Neither of the two factors which saved the statutes in *Holt* are applicable to the case of that non-Indian. It is precisely because he resides within the reservation boundaries, and not outside, that the Tribe claims power as a sovereign over him. And further, that power includes the very sorts of governmental authority—zoning, taxation, and presumably eminent domain—which were missing from the Alabama statutes. As *Holt* demonstrates, the broader the claim of governmental power, the more serious the constitutional problem becomes. And the claim of the Tribe here is broad indeed—it is that of a third type of sovereign government, separate from the states and the federal government.

Nor does it solve this problem to invoke—as does the Solicitor General—*Talton* v. *Mayes*, 163 U.S. 376 (1896), or *United States* v. *Wheeler*, 435 U.S. 313 (1978). See U.S. Brief, p. 40. True, in some instances, Indian tribes are not "subject to the strictures of *** the Constitution." U.S. Brief, p. 40.[25] *But*

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[25] The parallel strictures of the Indian Civil Rights Act are directly applicable to the Tribe itself. See, 25 U.S.C. §1302(8). This is a second reason why any reliance upon *Talton* and *Wheeler* is misplaced. We note, without comment, the suggestion of the Solicitor General that these statutory strictures can be avoided by the simple expedient of forbidding non-Indians

(footnote continues)

the United States is subject to those strictures. And it is *federal law, i.e.,* a treaty, which supposedly provides the basis for this claim of tribal governmental power over non-Indians. Cf., *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). Certainly, the relationship between the Crow Tribe and the United States is markedly closer than the relationship between the private restaurant owner in *Burton* and the State of Delaware.

No constitutional problem is presented, of course, if the inherent power of Indian tribes over non-Indians is confined to the power to exclude them from Indian lands and to condition their entry upon those lands. Those powers have long been exercised by Indian tribes and are not strikingly different from those exercised by any landowner.[26]

Nor is a constitutional problem presented when an exercise of federal power over non-Indians is made dependent upon the interests and desires of the Tribe. The provisions of 18 U.S.C. § 1165 are an example, as are the provisions of 18 U.S.C. § 1161, involved in *United States* v. *Mazurie,* 419 U.S. 544 (1975). So also is 42 U.S.C.§ 7474, relating to determination of air quality standards for reservation lands. In each of these examples, the subject matter is very specific and narrow and would thus, we believe, certainly pass even the stringent constitutional tests of the dissenters in *Holt,* as the holding in *Mazurie* itself demonstrates. 419 U.S. at 457, 458.

This case is the proper one, we suggest, for this Court to put an end to the claim of Indian tribes to sovereign powers over non-Indians, by explicitly confining tribal powers to tribal *self*-government. In *Oliphant* v. *Suquamish Tribe,* 534 U.S. 191

(footnote continued)

to cross the reservation boundaries and thus prevent them from coming "within its [the Tribe's] jurisdiction," (U.S. Br., p. 40) despite the United States and the Tribe's invitation to enter and reside there.

[26] The tribal power to exclude is not confined to tribal lands but undoubtedly extends to lands owned by its individual members, *i.e.,* allotted lands. Thus, the power is broader than that of the ordinary landowner and, for this reason, can justifiably be viewed as a governmental, rather than just a proprietary, power. But we did not see this as raising any constitutional problem.

(1978), it took the first step in that direction. Applying the rationale of *Oliphant*, it should take the final step here.[27]

This does not mean that reservation Indians are without protection when non-Indians endanger their legitimate interests. They have the power to exclude them from Indian lands, and Congress has hardly been reluctant to protect those interests, even from non-Indians on non-Indian lands, when the Indians can show they merit protection.

But Congress has never granted recognition to the claims of sovereign power over non-Indians asserted here. Nor should this court.

THE DUE PROCESS AND EQUAL PROTECTION ISSUES

Neither the Crow Tribe nor the United States has met Montana's strong argument that Tribal Resolution 74-05 violates due process and equal protection rights of non-Indians. These rights are much too important to simply ignore, as Respondents would apparently have this Court do. Resolution 74-05 is not the act of an independent sovereign nation. Nor is it merely an act to regulate the internal affairs of the Crow Tribe. Rather, the resolution is a bold attempt to confiscate property rights because of ethnic differences which is implicitly sanctioned and actively supported by the United States. As such, it violates basic constitutional principles and cannot be upheld.

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[27] In oral argument in *Oliphant*, the following colloquy occurred:

"Question: [by Justice Rehnquist] Mr. Ernstoff is there any way of distinguishing your case from civil jurisdiction of the Tribe so that the court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?

Mr. Ernstoff [counsel for the Suquamish Tribe]: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you. * * * To intellectually honest, I do not think you really can and I do not think that you should. * * *" (Transcript of Oral Argument)

That "very interesting" question remains critical here. For the reasons given in our prior brief (Pet.Br., pp. 34, 35) and the various briefs of *amicus curiae* (*e.g.*, Brief of State of Washington, pp. 18-21), we agree with counsel's answer. The rationale of *Oliphant* is applicable on the civil as it is on the criminal side. Neither the Tribe nor the Solicitor General make any serious effort to show otherwise.

Perhaps, it is true that at one time Indian tribes, as sovereign nations, had the power to rule without regard to the rights of due process and equal protection. But that time is long past. Their acceptance of the protection of the United States government and their dependence upon it to enforce their rules necessitates that any sanctions they seek to impose upon non-Indians be carefully drafted to comport with the United States Constitution.

In *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), this Court struck down racially discriminatory policies of a "purely private" party, where it found substantial state involvement. In so doing, the Court noted:

> "* * * the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

This language is remarkably applicable to the actions of the United States government in the instant case. The Crow Reservation was created by the Treaty of 1868 negotiated between the tribe and the United States government. Lands within the reservation were subsequently opened for sale to non-Indians, by an act of the United States. General Allotment Act of 1887, 24 Stat. 388, Pet. App., pp. 97-104; Crow Allotment Act of 1920, 41 Stat. 751, Pet. App., pp. 105-118. Even more directly, Tribal Resolution 74-05 was submitted for approval to the United States. C-T Ex. 71-rr; J.Ap. 92. The resolution itself was enforced by wardens deputized by the Bureau of Indian Affairs. Tr., 252-253. Indeed, the very fact that the United States brought this action to vindicate the Tribe's alleged "exclusive treaty right" to hunt and fish (J.App., p. 11, para. 3) dramatically highlights federal approval of the discriminatory resolution. Therefore, it is clear that the deprivation of property rights pursuant to Resolution 74-05 cannot occur without the aid and participation of the United States.

That such discriminatory legislation would never be permissible by a state is equally clear. The United States (U.S. Br., p. 41) has attempted to liken Resolution 74-05 to the state regulation at issue in *Baldwin* v. *Montana Fish and Game*

Commission, 436 U.S. 371 (1978). The form of regulation attempted by Resolution 74-05 is entirely different from that upheld in *Baldwin*. In *Baldwin*, Montana was able to show a rational basis to justify assessing nonresidents a higher licensing fee. Moreover, Montana did not attempt to completely prohibit hunting by nonresidents; nor did it make any distinction based on ethnicity of hunters or landowners.

In contrast, no rational basis for 74-05 has been demonstrated. First, there is nothing in the record establishing a shortage of fish or game on the reservation. Second, there has been no showing that nonresident owners and other non-Indians hunting or fishing on fee lands have in any way interfered with the Crow Tribe's hunting and fishing rights. In *Toomer v. Witsel*, 334 U.S. 385 (1948), this Court stated that discrimination against noncitizens would be constitutional only where it had been established "that non-citizens constitute a peculiar source of the evil at which the statute is aimed." In striking down legislation which placed much higher fees on non-resident than resident fishing, the Court said:

> "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." (334 U.S. at 399)

Third, and perhaps most importantly, there is no evidence that the Crows have made any efforts to regulate the hunting and fishing activities of their own members. Faced with a somewhat similar regulatory scheme in *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285 (1977), this Court noted: "A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all." See also *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). Therefore, the lower court's decision upholding the validity of Tribal Resolution 74-05 should be reversed.

CONCLUSION

For the foregoing reasons, the district court's entire judgment should be reinstated.

RESPECTFULLY SUBMITTED this 25th day of November, 1980.

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